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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. LAURENCE LEE MARCELLUS, Petitioner.	2 CA-CR 2009-0250-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-57080

Honorable Clark W. Munger, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Laurence Lee Marcellus
Safford
In Propria Persona

K E L L Y, Judge.

¶1 Following a jury trial, Laurence Marcellus was convicted of burglary, attempted fraudulent scheme and artifice, and two counts of forgery. The trial court sentenced him to concurrent, aggravated prison terms, the longest of which was thirteen

years. This court affirmed the convictions and sentences on appeal. *State v. Marcellus*, No. 2 CA-CR 98-0434 (memorandum decision filed Mar. 9, 2000). Marcellus filed a notice and petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., in 2008 and 2009, claiming his sentence violated *Blakely v. Washington*, 542 U.S. 296 (2004). The trial court denied relief and summarily dismissed the petition, finding Marcellus had "presented no colorable claim" or "material issue of fact or law upon which [he] would be entitled to relief." This petition for review followed.

¶2 We review the trial court's denial of post-conviction relief for an abuse of discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Under Rule 32.2(a)(1), a defendant is "precluded from relief under this rule based upon any ground" that was "[r]aisable on direct appeal."

¶3 Because Marcellus could have raised his allegations of sentencing error on appeal, he is precluded from relief on that ground unless an exception to preclusion applies. *See* Rule 32.2(b). Neither *Apprendi v. New Jersey*, 530 U.S. 466 (2000), nor *Blakely* (which constituted a significant change in the law and a potential exception under Rule 32.1(g)) applies to his case.

¶4 Although *Apprendi* was a precursor to *Blakely* and was decided before our mandate issued in Marcellus's appeal, it did not require a jury to find aggravating factors under Arizona's sentencing scheme, as Marcellus implies. *See State v. Febles*, 210 Ariz. 589, ¶¶ 1, 11, 115 P.3d 629, 631, 633 (App. 2005). And *Blakely*, which is not retroactive, applies only to convictions not yet final at the time it was decided in 2004. *Febles*, 210 Ariz. 589, ¶¶ 1, 17, 115 P.3d at 631, 635. Marcellus's convictions had already become

final in 2000. *See State v. Towrey*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831-32 (2003) (conviction final when "'judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied,'" *quoting Griffith v. Kentucky*, 479 U.S. 314, 321 n.16 (1987)). Therefore, *Blakely* did not apply to Marcellus's conviction.

¶5 The trial court did not abuse its discretion by summarily dismissing Marcellus's petition and, although we grant Marcellus's petition for review, we deny relief.

VIRGINIA C. KELLY, Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

PHILIP G. ESPINOSA, Presiding Judge